Supreme Court, U. S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1153

KEM MANUFACTURING CO., INC.,

Petitioner

v.

DRACKETT PRODUCTS, CO., et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Wood Brown III
Daniel Lund
806 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112

Counsel for Petitioner

Of Counsel

MONTGOMERY, BARNETT, BROWN & READ
806 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Kem Manufacturing Co., Inc. applies for certiorari from the opinion and decree of the United States Court of Appeals for the Fifth Circuit dated July 6, 1979

[598 F.2d 402 (5th Cir. 1979)] and the denial of rehearing dated October 9, 1979 [604 F.2d 320 (5th Cir. 1979)] pursuant to 28 U.S.C. §1254(1).

OPINIONS BELOW

The original opinion of the Court of Appeals, rendered on July 6, 1979 and reported at 598 F.2d 402 (5th Cir. 1979) is appended hereto at pages A-1, et seq. An application for rehearing was timely filed and was denied by opinion dated October 9, 1979 and reported at 604 F.2d 320 (5th Cir. 1979), said opinion being appended hereto at pages A- 12, et seq.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This is an application to this Court for the issuance of its writ of certiorari. The original opinion of the Fifth Circuit Court of Appeals was rendered on July 6, 1979 and a timely application for rehearing was filed and denied by that Court on October 9, 1979.

The statute mentioned above confers jurisdiction of this Court. In addition, petitioner contends that this Court has inherent jurisdiction as regards the validity and interpretation of Rule 49, Federal Rules of Civil Procedure.

Copies of the original opinion are appended hereto at Pages A-1, et seq. Copies of the opinion on the application for rehearing are appended hereto at pages A-12, et seq.

QUESTIONS PRESENTED

Broadly stated, the issue here is the effect of Rule 49(a) F.R.C.P., penultimate and ultimate sentences. Those two sentences provide:

> "If in so doing the court omits any issue of fact raised by the pleading or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

In this case, as was noted by the Court of Appeals, there was a prima facie inconsistency in the verdict. As regards the claim by plaintiff against defendant Kem, the jury found no negligence, no failure to warn, no breach of warranty and no product defect. At the instance of the co-defendant Drackett, the issue of indemnity by one defendant to another was put to the jury. The issue of contribution was "almost overlooked at the trial and ignored in the special verdict" [598 F.2d at 407, 2d co. 3rd para.].

The inconsistency lay in the action of the jury in making a fact finding which precluded indemnity on the basis of the instructions given them. Notwithstanding this, the law is to the effect that everything possible that can be done must be done to make a jury verdict consistent.

The issue, then, is whether, under Rule 49(a) where an inconsistency engendered by instructions on indemnity necessitates a new trial on the issue on contribution which was "ignored in the special verdict" or whether Rule 49(a) permits a decision thereon by the Court which should be enforced on appeal. The trial Court dismissed the demands for contribution. The Court of Appeals reversed, holding that the inconsistency required a new trial. Our contention is that the Court of Appeals erred in so doing.

Put another way, the pleading, the pretrial order and the evidence at trial raised the issue of contribution among joint tortfeasors. Drackett took the position that it also raised the issue of indemnity. In the first part of its verdict, the jury found that defendant Kem was *not* a joint tortfeasor. In that portion dealing with indemnity, in response to the Court's instructions, they found both defendants to have been guilty of "active negligence" thereby precluding indemnity. It is obvious on the face of the papers that the two responses are inconsistent.

However, the inconsistency results from instruction on indemnity, not on contribution which was omitted from the special verdict. The finding precludes indemnity by operation of law. Does it, however, entitled Drackett in this case to a new trial on the issue Drackett "ignored in the special verdict"? Or, as Rule 49(a) provides, is Drackett bound by its failure to demand submission of contribution to the jury?

The Court of Appeals held that a new trial was mandated. We suggest that this was error, under the circumstances.

STATEMENT OF THE CASE

The statement of the facts of the case prior to its submission to the Court of Appeals is correctly and accurately done by the organ of that Court in the initial opinion [598 F.2d at 404-05 under the Number "I"]. There is no need for this Court to go outside that statement.

> "Michael Guidry, who was employed by the Archdioceese of New Orleans to do maintenance work at at the Jesuit Church in downtown New Orleans, poured Thermakem, a drain cleaning product made by Kem Manufacturing Co., into a sink drain. The liquid in the drain erupted, seriously injuring him. The jury found that the accident occurred when Thermakem was unintentionally mixed with Drano, a drain cleaner made by Drackett, that was already in the sink.

At this point, the Court included a footnote. It is included here, in text, for continuity and understanding:

> "Evidence was introduced at the trial to explain why the eruption occurred. Thermakem contains 93% sulfuric acid. It unclogs drain pipes by dissolving organic obstructions. In use it generates heat ranging from 150 to 200 degrees Farenheit. Sulfrric acid is highly reactive, especially with alkaline chemicals known as caustic soda. Drano, like many other drain opening products, contains a large proportion of caustic soda. The alkalinity of caustic soda does not change with time alone. Therefore, if caustic soda is present in a drain, even for a period of days it will still violently react when combined with sulfuric acid.

The text of the opinion picks up, at this point:

"The stage was set for the accident when one of the church cooks used Drano in an effort to clear a troublesome drain on the evening of Saturday, March 4, 1972. When the drain clogged again on Monday, a priest asked Guidry to attent to it, but said nothing about the efforts made on Saturday. Guidry used Thermakem for the job. The eruption that resulted burned him severly and caused a significant impairment of his vision. He sued both Kem and Drackett, and Drackett cross-claimed against Kem seeking indemnity on the basis that Kem was actively negligent and it was only passively negligent; it urged alternatively that Kem was a joint tort feasor responsible under Louisiana law for contribution. The pre-trial order briefly mentioned the demand for contribution and indemnity. It simply noted that Drackett listed as a contested issue of law whether it was entitled to recover from third-party defendants.

"At the trial no mention was made of the theory that Drackett and Kem might be joint feasors; Drackett put its energies into efforts to defeat the plaintiff and, if it lost, to recover the total judgment from Kem on the basis that Kem owed it indemnity. there was no instruction whatever on contribution and no objection to its omission.

" On the basis of the jury's answers to special interrogatories, the court entered judgment for Guidry with respect to his claims against Drackett, and against Drackett with respect to its claims against Kem. Drackett appeals only the judgment entered by the trial court rejecting its claims for contribution from Kem.

"The first interrogatory to the jury was in connection with Guidry's claim:

> 1. Was the product supplied by defendant Kem Manufacturing Company (Kem) defective, or did defendant Kem breach its implied warranty or negligently fail to warn plaintiff, in a manner which was a proximate cause of injury to plaintiff Mr. Guidry?

"The answer was "No." The jury, however, answered affirmatively a similar interrogatory concerning Drackett. Therefore only Drackett was cast in judgment to the plaintiff. The jury awarded Guidry $1,500,000 against Drackett and that judgment, after its remittitur to $711,417.81, has been satisfied.

"Because counsel and the court focused their attention on the indemnity issue, the interrogatory to the jury with respect to the cross claim asked:

> 7. Was third-party defendant Kem Manufacturing Company actively negligent in a manner which was a proximate cause of injury to plaintiff?

"The jury answered "Yes." Thus the answers to questions 1 and 7 are apparently inconsistent: Kem was "actively negligent in a manner which was a proximate cause of injury" to Guidry (No. 7), but its product was not "defective" nor did it "breach its implied warranty or negligently fail to warn plaintiff, in a manner that was a proximate cause of injury" to him (No. 1). Despite the evident problem created by those answers neither party requested resubmission of any question to the jury.

"Drackett urges that appearances are deceiving and that, correctly interpreted, the answers to the two

> questions can be reconciled; alternatively it contends that the contribution issue was omitted, hence was to be decided by the court."

The mention of "Drackett" in the last paragraph should be "Kem" because this was our contention and is one that Drackett, as the party attacking the verdict, would not have made.

The only other fact necessary to this Court's determination is the fact that the charge on the question was objected to as improper under the facts of the case and that it was confusing. This is reflected by the organ of the Court of Appeals at footnote 5, 598 F.2d at 407.

The Court of Appeals has correctly stated the nature of Louisiana law of contribution. See footnote 3, 598 F.2d at 406. Tort indemnity in Louisiana is severely restricted to those cases in which the potential indemnitee is legally liable solely because of the actual fault of the potential indemnitor. See *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922); *Stewart v. Roosevelt Hotel Corp.*, 170 So.2d 681 (La. App. 1965).

This jury was properly instructed as to *indemnity*, not *contribution*. Its answer to the questions posed was that both defendants were "actively" negligent, an answer which precluded indemnity. Not having been instructed as to contribution, the answers mean nothing in the context of that doctrine.

After the presentation, briefing and argument of post trial motions, the district Court remitted the verdict in plaintiff's favor and granted judgment in that amount against Drackett. As to the cross claims and third party claims, judgment was rendered against Drackett and in favor of Kem dismissing them. We suggest that this was proper, even mandated, under the express terms of Rule 49(a) F.R.C.P.

REASONS FOR GRANTING THE WRIT

Rule 49(a) F.R.C.P. says that the jury shall be instructed as to the factual issues presented and shall be permitted to answer written questions thereon. It further provides that, where issues are "omitted" the judge shall make a finding, and that a finding shall be "deemed" to be in accord with his final judgment where no specific finding is made.

The error which requires correction in this case is patent on the face of the original opinion of the Court of Appeals on page 407 of 598 F.2d.

> ". . . The cross claim by Drackett raised legal issues almost overlooked at the trial and ignored in the special verdict. . . ."

This is a finding with precision that something contemplated by Rule 49(a) has occurred, yet the Court of Appeals chose to ignore the specific instructions of the rule and to remand for a new trial on the ancillary demand for contribution.

On application for rehearing, in which the above matters were called to the attention of the Court, its opinion draws a

distinction between issues of fact and questions of law. That ignores the context in which decisions of juries are always made, that context being within the format of the judge's instructions. This jury was instructed on the law of *indemnity*, not *contribution* [598 F.2d at 404, 2d col.]. Louisiana's law and jurisprudence concerning contribution, as succinctly and correctly set forth in the Court of Appeals decision, was *not* given to this jury. They *were* told about indemnity, about the facts that a defendant could be legally liable because of the operation of law yet entitled to indemnity if another party was "actively" at fault. They *were* told that, on the other hand, where both defendants were "actively" at fault, there would be no indemnity. They were *not* told what a finding of "active" fault on the part of both defendants would have in a contribution context. The jury's answer as stated by the Court of Appeals in its statement was a clear response that indemnity was not to be had in this case.

We respectfully submit that it is no explanation in this case for the error in the opinion to make the artificial distinction between "factual" issues and "legal" questions. We suggest that the right of a party either to indemnity or to contribution is, in either case a mixed question of fact and law. Indemnity is dependent upon factual findings, not in a vacuum, but given an appreciation of the evidence and proper instructions by the Court. Contribution is exactly the same. The jury must hear the evidence, then must apply the law given it by the Court.

In this case, this jury was not instructed on contribution. It answered a question concerning "active negligence" on the

basis of instructions which said that, if both parties were guilty of active negligence there would be no indemnity. Does it necessarily follow that this finding mandates contribution, especially where, as here, the original finding by the jury was that Kem was not guilty of negligence, had not failed to properly warn, had breached no warranty and had not put a defective product on the market?

In this context, it cannot possibly be said, as did the Court of Appeals, that "contribution" is purely a legal issue. It is, properly, a legal consequence of a finding that both defendants were guilty of negligence. It does not follow from a finding in a case like this where a jury is told that, if both defendants are guilty of "active negligence" there would be no indemnity, immediately following a finding that, as to the plaintiff, there was no negligence on Kem's part.

We submit that the verdict was subject to reconciliation on this basis. This jury determined in its first answers, that Kem was not liable to the plaintiff, that it was not a joint tortfeasor. In the latter portion of the special verdict, in response to instructions on indemnity, it found that there should be no indemnity.

There is an established rule long engrained in the jurisprudence of this Court, that the district Courts and Courts of Appeals have a duty, arising from the Seventh Amendment of the U. S. Constitution to reconcile apparently conflicting answers in special verdicts if at all possible and thus to validate the jury's verdict. See *Gallick v. Baltimore & Ohio Railroad*

Co., 1963, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618, 627; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 1962, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 806. *Willard v. The John Hayward*, 5 Cir. 1978, 577 F.2d 1009; *Loffland Brothers Co. v. Roverts*, 5 Cir. 1967, 386 F.2d 540, *cert denied*, 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed. 2d 830.

In this case, the district judge followed the law and dismissed the ancillary demand for contribution and indemnity. The Court of Appeals failed to do so.

CONCLUSION

As stated above, the error in this case is patent on the face of the opinion of the Court of Appeals. The Seventh Amendment to the Constitution requires a high degree of sanctity of jury verdicts. Judicial economy requires an end to litigation. Rule 49(a) was apparently promulgated with both ends in mind where issues raised by the parties are not submitted to the jury.

Neither consideration is served by an opinion which permits a party to ignore [omit] an issue from a jury trial neglict to submit it to the jury, and then, after legally suffering an adverse determination by the judge change course and obtain a new trial as to that issue omitted ["ignored"].

The jurisprudence of this Court requires extraordinary efforts to be taken to reconcile verdicts. That jurisprudence is

consistent with the apparent purpose of Rule 49(a) and with the Constitution.

We respectfully suggest that *none* of the above is served by the aberration represented by the appellate opinion in this case and that same should be reversed, the district Court judgment reinstated and the ancillary claim of Drackett dismissed.

RESPECTFULLY SUBMITTED

MONTGOMERY, BARNETT, BROWN & READ

BY_____
Wood Brown III, T.A.

BY_____
Daniel Lund

806 First Nat'l Bank of Commerce Bldg.
New Orleans, La. 70112 [504] 561-8989
Attorneys for Kem Manufacturing Co., Inc.

CERTIFICATE

I hereby certify that, as required by the Rules of the United States Supreme Court, Rules 21 and 33, three copies of the foregoing document have been served on each of the following named individuals by depositing same in an appropriate receptable of the UNITED STATES POST OFFICE, first class postage prepaid addressed as follows:

Harry McCall, Jr., Esq.
Corinne M. Hopkins, Esq.
1500 N.B.C. Bldg.
New Orleans, La. 70112

Frank J. D'Amico, Esq.
1153 N.B.C. Bldg.
New Orleans, La. 70112

Lloyd C. Melancon, Esq.
Hibernia Bank Bldg.
New Orleans, La. 70112

James H. Drury, Esq.
850 B.N.O. Bldg.
New Orleans, La. 70112

New Orleans, La., January 4, 1980.

Wood Brown III

Daniel Lund.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

MICHAEL J. GUIDRY, Plaintiff,

v.

KEM MANUFACTURING COMPANY,
Defendant.

DRACKET PRODUCTS COMPANY et al.,
Defendants-Third Party Plaintiffs-Appellants,

v.

KEM MANUFACTURING COMPANY et al.,
Third Party Defendants-Appellees.

No. 77-1492

July 6, 1979

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before GODBOLD, Circuit Judge, SKELTON*, Senior Judge,
and RUBIN, Circuit Judge.

ALVIN B. RUBIN, Circuit Judge:

[1] Invoking diversity jurisdiction, an injured user brought a products liability suit against two manufactures whose chemicals for clearing plumbing drains harmed him when they were inadvertently mixed together in a kitchen sink. The trial court required the jury to return a special verdict as authorized by Rule 49(a), Federal Rules of Civil Procedure, by answering separate interrogatories relating to the

*Senior Judge of the United States Court of Claims, sitting by designation.

plaintiff's claims against each defendant and additional wuestions arising out of the cross-claims for contribution and indemnity brought by one defendant against the other. The resulting judgment in favor of the plaintiff against one defendant has been satisfied after remittitur. The defendant case in judgment, however, contends that the jury's answer concerning its cross-claim for contribution against the other manufacturer was inconsistent with its answer concerning that manufacturer's liability to the plaintiff, and seeks reversal of the judgment entered by the trial court denying contribution. Because we agree that the jury's answers were inconsistent and can find no reasonable resolution for the apparent inconsistency, we reverse and remand for a new trial on the cross-claim.

I.

Michael Guidry, who was employed by the Archdiocese of New Orleans to do maintenance work at the Jesuit Church in downtown New Orleans, poured Thermakem, a drain cleaning product made by Kem Manufacturing Co., into a sink drain. The liquid in the drain erupted, seriously injuring him. The jury found that the accident occurred when Thermakem was unintentionally mixed with Drano, a drain cleaner made by Drackett, that was already in the sink. [1]

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1. Evidence was introduced at the trial to explain why the eruption occurred. Thermakem contains 93% sulfuric acid. It unclogs drain pipes by dissolving organic obstructions. In use it generates heat ranging from 150 to 200 degrees Farenheit. Sulfuric acid is highly reactive, especially with alkaline chemicals, such as sodium hydroxide, commonly known as caustic soda. Drano, like many other drain opening products, contains a large proportion of caustic soda. The alkalinity of caustic soda does not change with time alone. Therefore, if caustic soda is present in a drain, even for a period of days, it will still violently react when combined with sulfuric acid.

The stage was set for the accident when one of the church cooks used Drano in an effort to clear a troublesome drain on the evening of Saturday, March 4, 1972. When the drain clogged again on Monday, a priest asked Guidry to attend to it, but said nothing about the efforts made on Saturday. Guidry used Thermakem for the job. The eruption that resulted burned him severly and caused a significant impairment of his vision. He sued both Kem and Drackett, and Drackett cross-claimed against Kem seeking indemnity on the basis that Kem was actively negligent and it was only passively negligent; it urged alternatively that Kem was a joint tort feasor responsible under Louisiana law for contribution. The pre-trial order briefly mentioned the demand for contribution and indemnity. It simply noted that Drackett listed as a contested issue of law whether it was entitled to recover from third-party defendants.

At the trial no mention was made of the theory that Drackett and Kem might by joint tort feasors; Drackett put its energies into efforts to defeat the plaintiff and, if it lost, to recover from Kem on the basis that Kem owed it indemnity. There was no instruction whatever on contribution and no objection to its omission.

On the basis of the jury's answers to special interrogatories, the court entered judgment for Guidry with respect to his claims against Drackett, and against Drackett with respect to its claims against Kem. Drackett appeals only the judgment entered by the trial court rejecting its claims for contribution from Kem.

The first interrogatory to the jury was in connection with Guidry's claim:

1. Was the product supplied by defendant Kem Manufacturing Company (Kem) defective, or did defendant Kem breach its implied warranty or negligently fail to warn plaintiff, in a manner which was a proximate cause of injury to plaintiff Mr. Guidry?

The answer was "No." The jury, however, answered affirmatively a similar interrogatory concerning Drackett. Therefore only Drackett was cast in judgment to the plaintiff. The jury awarded Guidry $1,500,000 against Drackett and that judgment, after its remittitur to $711,417.81, has been satisfied.

Because counsel and the court focused their attention on the indemnity issue, the interrogatory to the jury with respect to the cross claim asked:

7. Was third-party defendant Kem Manufacturing Company actively negligent in a manner which was a proximate cause of injury to plaintiff?

The jury answered "Yes." Thus the answers to questions 1 and 7 are apparently inconsistent: Kem was "actively negligent in a manner which was a proximate cause of injury" to Guidry (No. 7), but its product was not "defective" nor did it "breach its implied warranty or negligently fail to warn plaintiff, in a manner that was a proximate cause of injury" to him (No. 1). Despite the evident problem created by those answers neither party requested resubmission of any questions to the jury.[2]

Drackett urges that appearances are deceiving and that, correctly interpreted, the answers to the two questions can be reconciled; alternatively it contends that the contribution issue was omitted, hence was to be decided by the court.

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2. Perhaps the $1.5 million eruption so stunned them that their reactions were slowed, but this is mere speculation.

II.

Most civil cases in federal courts have been, and still are, resolved by a general verdict. After receiving the court's instructions, the jury weighs the facts in light of the court's instructions and renders a verdict for the plaintiff or the defendant. Judges and lawyers and all laymen who have thought about the process know that this permits the jurors to import notions of lay justice, to temper legal rules and to render a verdict based on their consciences and their ideas of how the case ought to be decided without strict compliance with the rules laid down by the court. This flexibility is a deliberate part of the jury system, and is sanctioned so long as there is sufficient evidence to support the verdict regardless of the judge's agreement or disagreement with the outcome. If the trial judge is convinced that the result is contrary to the verdict that reasonable people would have reached, *cf. Trawick v. Manhattan Life Insurance Co.*, 5 Cir. 1971, 447 F.2d 1293, he may grant a new trial. In most instances of course, he abides by the verdict of the jury.

Rule 49 makes available alternate procedures that may be adopted by the trial judge to focus the jury's attention on the factual issues: a general vercict accompanied by answerd to interrogaroties about particular issues in the case (Rule 49(b)); or, dispensing altogether with the general verdict, submission of the various fact issues to the jury in the form of questions with the answers forming a special verdict on each (Rule 49(a)). *See generally* 5A Moore's Federal Practice ¶¶49.02-49.06 (2ded. 1977); 9 C. Wright and A. Miller, Federal Practice and Procedure: Civil §§2505-13 (1971). The latter procedure was chosen by the trial court here.

[2] The special verdict permitted by Rule 49(a) is a splendid device for clarification of jury verdicts and for focusing the jurors' attention on the disputed facts without the possible confusion that may result from a lengthy charge concerning the different legal rules that would apply if the jury reaches one factual conclusion rather than another. Therefore, we have repeatedly and frequently praised its use. *See, e. g., Gainesville Utilities Department v. Florida Power & Light Co.*, 5 Cir. 1978, 573 F.2d 292, 294 n.3, *cert denied*, 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed.2d 424; *Cormier v. Rowan Drilling Co.*, 5 Cir. 1977, 549 F.2d 963, 967; *American Oil Co. v. Hart*, 5 Cir. 1966, 356 F.2d 657, 659 and n.5; *See also Brown, Federal Special Verdicts: The Douby Eliminator*, 1968, 44 F.R.D. 338; Wright, *The Use of Special Verdicts in Federal Court*, 1965, 38 F.R.D. 199. However, like all fine tools, it must be skillfully employed and its successful use requires the careful attention of counsel for all parties as well as of the court to be certain that the questions are framed to avoid the possibility of inconsistent answers. This case demonstrates the problems that arise if it is used without the requisit care.

Under the state practices that constitute the models for Rule 49(a), the form of the question was the "hardest point of the practice." *Moore, supra*, ¶49.03[2] at 2210. The rule mandates no particular form for the questions, stating only that they shall be "susceptible of categorical or other brief answer," or that the court may "use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate."

As Chief Judge John R. Brown has noted, the Rule 49(a) special verdict is not "an error-proof, thought-proof, mechanical device. It has its pitfalls, nearly all due to its

virtues. Its capacity for precision, excision of fact and legal issues, is at once its danger area. For nothing is so wrong as imprecise precision nor so glaring as conflicting precision." *Brown, supra*, 44 F.R.D. at 349. Its very accuracy makes it unsuitable for indifferent use; unless carefully aimed the questions miss the target completely.

The rule itself provides insurance against one hazard: the necessity that the jury decide every element of recovery or defense lest the verdict remain incomplete and indecisive. If counsel do not timely request that an issue be submitted to the jury, it may be resolved by the court. If the court fails to make a finding, "it shall be deemed to have made a finding in accord with the judgment on the special verdict." F.R. Civ.P. 49(a).

[3] It is critical, however, that the structure of the questions and proposed answers avoid the possibility that the answers will be conflicting. That danger is mitigated by the court's duty, arising from the seventh amendment guarantee of the right to jury trial, to reconcile apparently conflicting answers if at all possible and thus validate the jury verdict. *Gallick v. Baltimore & Ohio Railroad Co.*, 1963, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618, 627; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 1962, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 806. We have applied this rule countless times. *E. g., Willard v. The John Hayward*, 5 Cir. 1978, 577 F.2d 1009; *Loffland Brothers Co. v. Roberts*, 5 Cir. 1967, 386 F.2d 540, *cert denied*, 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830. Where, however, the answers cannot be reconciled "after a concerted effort" *Miller v. Royal Netherlands Steamship Co.*, 5 Cir. 1975, 508 F.2d 1103, 1106, a

new trial must be granted. *E. g., Griffin v. Matherne,* 5 Cir. 1973, 471, 441 F.2d 911; *Hand v. United States,* 5 Cir. 1971, 441 F.2d 529; *Royal Netherlands Steamship Co. v. Strachan Shipping Co.,* 5 Cir. 1966, 362 F.2d 691, *cert denied,* 1967, 385 U.S. 1004, 87 S.Ct. 708 and 710, 17 L.Ed.2d 543.

[4,5] Decision may not be avoided on the basis that the claim for contribution was waived. Under Louisiana law, [3] if the facts adduced at trial create liability between co-defendants as joint tort feasors, a claim for contribution may be urged for the first time even on appeal. A joint tort feasor may seek contribution by appealing from a judgment relieving his co-defendant of liability even though no third party demand was initiated in the trial court, because such an appeal is tantamount to a third party demand. *Emmons v. Agricultrial Insurance Co.,* 1963, 245 La. 411, 158 So.2d 594, 600; *Cunningham v. Hardware Mutual Casualty Co.,* La.App.1969, 228 So.2d 700,

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3. Louisiana Civil Code article 2103 provides:

When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between the solidary debtors, each is liable only for his virile portion of the obligation.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article 1111 through 1116 of the Code os Civil procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.

704. [4]

[6] Louisiana Civil Code article 2103 makes the issue of contribution between joint fort feasors one of law, to be resolved by the court in accordance with the factual findings. *Cf. Trahan v. Highlands Insurance Co.,* La.App.1977, 343 So.2d 1163, 1165-66, *cert denied, La.,* 346 So.2d 208. This question in Louisiana practice is in most instances decided by the court - not the jury. *Cf. Green v. Taca International Arilines,* La.1974,

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(3. continued)

The term "in solido" is defined in LSA Civil Code art. 2324: He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido,* with that person, for the damage caused by such act.

See generally Equilease Corp. v. Smith Int'l, Inc., 5th Cir. 1979, 588 F.2d 919, 923; *Reeves v. Louisiana & Ark. Ry. Co.,* La. 1973, 282 So.2d 503; *Dixon v. Gutnecht,* La.App.1976, 339 So.2d 1285, 1291-92, *cert denied,* La. 1977, 342 So.2d 673; Comment, *Contribution Among Joint Tortfeasors: Louisiana's Past, Present, and Future,* 37 Tul.L.Rev. 525 (1963); Comment, *Contribution Among Joint Tortfeasors,* 22 La.L.Rev.818 (1962).

4. We need not decide whether even in a diversity case Louisiana substantive law would support the use of that procedure in federal court, in view of the requirment if Rule 12(b), F.R. Civ.P., that cross-claims be asserted in the responsive pleading, because contribution was sought by the pleading. *Compare Travelers Inc. Co. v. Busy Elec. Co.,* 5 Cir. 1961, 294 F.2d 139, 149. It is not even claimed, as it would be fruitless to do, that the carelessness of all counsel in failing to seek a verdict focused on the issue constituted a waiver by Drackett alone.

304 So.2d 357, 359. *Compare, e. g., Brandt v. Olson,* N.D. Iowa 1961, 190 F.Supp. 683, 688-89. Here, it was proper to allow the jury to resolve the question whether either or both of the defendants were liable to Guidry.

The answer to question 7 may reflect the jury's intention to deny any recovery on the third party indemnity demand by Drackett against Kem; [5] but it also demonstrates a view of the facts patently contrary to that reflected in the answer to question 1. The fact analysis reflected by the negative answer to question 1 is, "Kem was not negligent." The fact analysis essential to the positive answer to question 7 is, "Kem *was* actively negligent."

The question whether Kem was negligent was not omitted. It was put, at least implicitly, not once but twice. Therefore, the issue could not be resolved by the trial judge under that provision of Rule 49(a) permitting him to decide pretermitted questions. Nor could the court decide the issue of contribution because of the inconsistent answers.

III.

With characteristic pithiness, Chief Judge Brown has said that, in constructing the Rule 49(a) special verdict, "[T]he Judge is forced to think, and think hard." With the help of counsel, he must begin "by anticipating all of the likely, probable answers and then testing these several likely results against the possible existence of conflict." 44 F.R.D. at 351.

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5. Kem contends that because no claim for indemnity lies between one manufacturer and another in Louisiana, the indemnity issue should not have been submitted to the jury, and that the court's charge on indemnity was erroneous and confusing. We need not assess the accuracy of this fusillade; fact questions were submitted to the jury. These answers are what we must appraise.

When an appellate court decides that a new trial is required, the trial court is reversed. Often, as here, the fault is not in the court. The cross-claim by Drackett raised legal issues almost overlooked at the trial and ignored in the special verdict. Trial counsel for either party might have obviated the necessity for this appeal and for the partial new trial that must ensue had they, before the case went to the jury, directed the court's attention to those issues or assisted the court by more careful attention to the specific questions framed by the court. After the verdict, they could have sought resubmission to the jury. On all of these matters, the trial judge is neither expected nor required to rely only on his own comprehension, throughness and prescience.

We are aware that the trial court fell into a snare that it did not construct and that our conclusion requires part of a lengthy trial to be repeated. Nevertheless because the jury's answers to the questions reflect inconsistent fact findings, we must reverse the judgment in favor of Kem on Drackett's cross-claim for contribution and remand for a new trial with respect to that issue.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

MICHAEL J. GUIDRY, Plaintiff,

v.

KEM MANUFACTURING COMPANY,
Defendant.

DRACKETT PRODUCTS COMPANY et al.,
Defendants-Third Party Plaintiffs-Appellants,

v.

KEM MANUFACTURING COMPANY et al.,
Third Party Defendants-Appellees.

No. 77-1492

Oct. 9, 1979

Appeal from the United States District Court
for the Eastern District of Louisiana.

ON PETITION FOR REHEARING

Before GODBOLD, Circuit Judge, SKELTON*, Senior Judge,
and RUBIN, Circuit Judge.

ALVIN B. RUBIN, Circuit Judge:

The application for rehearing suggests two alleged errors of law in our original opinion. We have fully reconsidered each issue.

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* Senior Judge of the United States Court of Claims, sitting by designation.

[1,2] Rule 49(a) does not contemplate that the jury will decide issues of law but will return "a special written finding upon each issue of fact." It is patent that no question on the special verdict directly inquired about contribution and that the issue of contribution as a matter of law was not submitted to the jury. It is also clear that the *fact* issues submitted to the jury were framed with the legal claim for indemnity in mind. However, the questions did submit to the jury resolution of the facts on which determination of the legal right to contribution would also be based. Drackett would have a legal right to contribution if in fact Kem was actively negligent in a manner that contributed to Mr. Guidry's injury. As pointed out in the original opinion, 598 F.2d at p. 407, "The fact question - was Kem negligent - was not omitted. It was put, at least implicitly, not once but twice." Therefore, the *fact* issue could not be resolved by the trial judge and, of course, the legal issue could not be decided without the indispensable finding of fact.

[3] The application for rehearing fails to distinguish between issues of fact and questions (sometimes called issues) of law. Under Rule 49(a) a trial judge can decide any issue of fact omitted from the written questions but the judge cannot resolve those issues of fact that were submitted.

Counsel misapprehended the references to their role in the trial and refer to the opinion as a castigation. The opinion merely points out that in the application of Rule 49(a) all problems cannot be resolved by the trial judge alone. He needs, and deserves, the assistance of counsel. The legal question of contribution was raised by the cross-claim; when the factual questions were submitted to the jury, all counsel and the

court failed to notice that the fact issues submitted to the jury permitted answers that might be inconsistent and, therefore, inconclusive in deciding whether Drackett was entitled to contribution. Counsel for Kem states, "We timely objected to the charge and submission of the indemnity issue." Whether Drackett or Kem made either request for the charge or an objection to it is not decisive; in the end fact questions essential to decision of the legal question of contribution were submitted, and were answered inconsistently.

[4] When a fact question is omitted, "each party waives his right to a trial by jury of the [fact] issue so omitted unless before the jury retires he demands its submission to the jury." Rule 49(a), F.R.C.P.. The rule does not imply that, if a fact issue is submitted, and the jury's answers concerning it are inconsistent, the court is either empowered to decide it or precluded from resubmitting the issues to the jury before it is discharged in order to attempt to obtain consistent responses.

[5] The Federal Rules of Civil Procedure of course govern trials in federal court. Footnote 4 in our original opinion makes it clear that we did not attempt in it to decide whether, even in a diversity case, a claim for contribution could be raised at a time later than required by Rule 12(b) Federal Rules of Civil Procedure. Our discussion of the substantive rights of parties to contribution under Louisiana law was designed to make it clear that this legal right had not been waived because it had been expressly urged in a timely filed counterclaim.

For these reasons, the petition for rehearing is DENIED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been mailed, postage prepaid, as is required by Rule 33 of the Rules of the United States Supreme Court to the following:

Harry McCall, Jr. Esq.
Corinne M. Hopkins, Esq.
1500 First N. B. C. Bldg.
New Orleans, La. 70112

Lloyd C. Melancon, Esq.
Hibernia Bank Bldg.
New Orleans, La. 70112

Frank J. D'Amico, Esq.
1153 First N. B. C. Bldg.
New Orleans, La. 70112

James H. Drury, Esq.
850 B.N.O. Bldg.
1010 Common Street
New Orleans, La. 70112

New Orleans, La. January 2, 1980.

/s/ Wood Brown III
WOOD BROWN, III, T.A.

/s/ Daniel Lund
DANIEL LUND